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Supreme Court of the United States

October Term, 1974

THE CITY OF EASTLAKE, et al.,
Petitioners,
vs.
FOREST CITY ENTERPRISES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF AMICUS CURIAE, CITY OF PARMA, OHIO

ROBERT R. SOLTIS
Special Counsel
Parma City Hall
6611 Ridge Road
Parma, Ohio 44129
(216) 886-2323
Counsel for Amicus Curiae

Sponsored By:
ANDREW BOYKO
Solicitor, City of Parma, Ohio

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On Petition for a Writ of Certiorari
To the Supreme Court of Ohio

BRIEF OF AMICUS CURIAE, CITY OF PARMA, OHIO

INTEREST OF AMICUS CURIAE

This amicus curiae brief is being filed pursuant to Rule 42-4 of the Rules of the Supreme Court of the United States, by the City of Parma, Ohio, a political subdivision of the State of Ohio, and is sponsored by its City Solicitor, the authorized law officer thereof.

Parma is vitally interested in the outcome of this litigation because it is one of the numerous communities in northeastern Ohio whose residents have initiated and adopted a referendum requirement similar to Eastlake's charter provision. Specifically, Parma has an additional vital interest because it has been sued by a builder who purchased property zoned for single-family residences and wants the

property rezoned for an office building without being subject to the referendum requirement.

Although in a sense city officials might feel the referendum requirement represents a lack of trust in the judgment of elected municipal officials, Parma officials regard the referendum requirement in a more positive light -- in that it represents the expressed desire of Americans to engage in participatory democracy. It represents a tangible expression of what would otherwise be bicentennial rhetoric about "government of, by, and for the people". Thus, it is particularly appropriate that this case is presented to the Court at this particular time in history. It will enable this high tribunal to reaffirm the concept that government in America is really of, by, and for the people who desire to participate in the making and unmaking of the laws affecting the very quality of their lives.

ARGUMENT

The Decision of the Ohio Supreme Court Denies the Cherished Right to Vote

As this Court unanimously held in Louisiana v. United States, 380 U.S. 145, 153 (1965), it is the "cherished right of people in a country like ours to vote". The right to vote is of the essence of a democratic society and that right is fundamental because it is preservative of all rights. Harman v. Forssenius, 380 U.S. 528, 537 (1965). Other rights, even the most basic, are illusory if the right to vote is undermined. Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

Undeniably, the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as federal elections. A consistent line of decisions by the Supreme Court in cases involving the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have a constitutionally-protected right to vote, and history has seen a continuing expansion of the scope of the right of suffrage in this country. Reynolds v. Sims, 377 U.S. 533, 554-555 (1964).

This Court's concern with protecting the cherished right to vote is a recognition that use of the ballot box is ultimately the only manner in which the power of the people (which is, as Alexander Hamilton noted in No. 78 of The Federalist Papers, superior to both legislative and judicial powers of government) can be effective. The father of American democracy, Thomas Jefferson, trusted the good sense and capability of the people to govern themselves, and believed that "the will of the people is the only legitimate foundation of any government". "Every government degenerates when trusted to the rules alone. The people themselves are its only safe depositories." "I know of no safe depository of the ultimate powers of the society but the people themselves." "No government can continue good, but under the control of the people." •

It is obvious from reading the majority and concurring opinions of the Supreme Court of Ohio that the court's majority miscon-

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• Jefferson on Democracy, ed. by Saul K. Padover, passim.

ceived the role of the people in the democratic process and lacked faith in the people's ability to make responsible decisions in matters of vital concern to them. They foreclosed the people's right to vote on zoning matters because of fear and distrust of the way they may vote.

But, in Carrington v. Rash, 380 U.S. 89, 94 (1965) this Court held that:

> "Fencing out" from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. "(T)he exercise of rights so vital to the maintenance of democratic institutions," Schneider v. State, 308 U.S. 147, 161, 60 S. Ct. 146, 151, 84 L. Ed. 155, cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents.

If it is constitutionally impermissible to deny the vote to a sector of the population because of the way they may vote, the entire community should not be disenfranchised because five judges question the voters' sense of responsibility or motives. Neither the due process clause of the Fourteenth Amendment nor any other provision of the Constitution justifies denial of the cherished right to vote on such a negative perception of participatory democracy.

"Democracy is a very simple principle, and those who speculate about its meaning are those who are not quite willing to accept it.

The dictionary defines it as 'the rule of the people'. Not much more need be said about it." •

Moreover, the gratuitous allusion to a discriminatory purpose injected by the concurring opinion below finds no support in the record, and verges on judicial irresponsibility. The court-imposed disenfranchisement would occur if the zoning matter involved an office building (as in Parma's litigation), or a factory, or a junk yard, or any other "spot zoning" request, as well as one involving housing.

REFERENDUMS ARE PEOPLE LEGISLATING

Article I, § 2 of the Constitution of the State of Ohio declares that "All political power is inherent in the people", and Article II, § 1 f provides that "The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action..."

It is therefore hardly an unlawful delegation of legislative power when the people of a municipality exercise their constitutional right to vote in a referendum election, and the dissenting opinion by Judge Corrigan below effectively countered the majority

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• Introduction to Bernard Smith, The Democratic Spirit at XXV-XXVI (New York: Alfred A. Knopf, 1941).

opinion's assertions on that point (Petition, pages 30-37).

As the Supreme Court of California held in banc in Johnston v. City of Claremont, 49 Cal. 2d 826, 837 (1958):

> The right of referendum with respect to zoning ordinances is essential for the rights of the electors of each city. A zoning ordinance can and does have a more direct and lasting effect upon property values and property owners within a city than almost any other type of ordinance.

As urbanization increases, institutions of local government, which have always been a major aspect of our system, and their responsible and responsive operation "is today of increasing importance to the quality of life of more and more of our citizens". Avery v. Midland County, Texas, 390 U.S. 474, 481 (1968).

Judicial decisions dealing with the cherished right to vote, in referendums, of people in urban areas are of vital national importance as more and more of the American people live in such areas. Denial of such right ostensibly on a federal constitutional ground should be suspect and carefully scrutinized.

As did the Arizona Supreme Court in Queen Creek Land & Cattle Corporation v. The Yavapai County Board of Supervisors, 108 Ariz. 449, 451 (1972), the Ohio Supreme Court should have affirmed the lower-court decisions upholding the right to a referendum on proposed zoning changes, for the power of

the people to legislate is as great as the power of the Legislature to legislate, and "The people, in exercising the rights of initiative and referendum, must enjoy the same immunity from judicial interference as do the Legislature and the inferior law-making bodies."

CONCLUSION

There are special and important reasons for granting the petition for a writ of certiorari in this case. The cherished right to vote is among the most important and preferred rights guaranteed by the Constitution. Any interference with the right to vote should be suspect. The precise question decided by the Supreme Court of Ohio has not been decided by this Court. The Ohio decision was ostensibly based on the Fourteenth Amendment, and the Supreme Court of Ohio misconstrued the cases it relied on, which were decided by this Court from four to six decades ago. Its decision is not in accord with the teaching of recent applicable decisions of this Court stressing the preferred status of the constitutionally-protected right to vote in state and local elections. The issues involved have significance beyond the confines of the State of Ohio, since the people of this nation are now predominantly urban dwellers. A denial of the right to vote on zoning issues affecting the very quality of the lives of Ohio residents, if used as a precedent by courts in other states, would have serious and far-reaching ill effects throughout this constitutional democratic republic. Even in this 200th year of our independence, there are some in public office who do not trust the people to make the

public decisions which affect the quality of their lives.

It is therefore respectfully submitted that for the reasons stated in this brief and those stated in the petition for a writ of certiorari, the petition should be granted, and the judgment of the Supreme Court of Ohio should be reversed.

Respectfully submitted,

ROBERT R. SOLTIS
Special Counsel
Parma City Hall
6611 Ridge Road
Parma, Ohio 44129
(216) 886-2323
Counsel for
Amicus Curiae
City of Parma, Ohio

Sponsored by:

ANDREW BOYKO
Solicitor, City of Parma, Ohio
Authorized Law Officer